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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VANELLE VASHAN JACKSON, Defendant and Appellant.	B292752 (Los Angeles County Super. Ct. No. BA461416)

APPEAL from the judgment of the Superior Court of Los Angeles County. Michael A. Tynan, Judge. Affirmed with directions.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Vanelle Vashan Jackson pled guilty to one count of second degree robbery and admitted a prior strike conviction. She was conditionally released to a residential substance abuse treatment program. After absconding from the program, defendant was detained and sentenced to a six-year state prison term.

Defendant requested and was denied a certificate of probable cause. She contends she is entitled to a remand for an eligibility hearing for mental health diversion pursuant to Penal Code section 1001.36 and that the lack of a certificate is no bar to her so requesting. Defendant also contends the court violated her rights by failing to hold an ability-to-pay hearing before imposing statutory fines and assessments. She further argues the $1,200 restitution fine was punitive and imposed in violation of the amount agreed to in the plea negotiation, and that she is entitled to three additional days of presentence custody credits.

We affirm defendant's conviction and direct the superior court on remand to reduce the restitution fine to the statutory minimum amount of $300, to correct the presentence custody credits to the total amount of 225 days and to prepare a modified abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 26, 2017, defendant tried to leave a liquor store with alcohol and cigarettes without paying. When the store clerk attempted to stop her from leaving the store with the merchandise, defendant hit the clerk several times about the head and face and also bit his hand.

Defendant was identified outside the store by the victim, as well as another witness, and arrested. She was charged with one count of robbery (Pen. Code, § 211). It was also alleged

defendant had suffered a prior robbery conviction which qualified as a prior strike under the "Three Strikes" law and as a felony enhancement.

In December 2017, defendant pled guilty to the robbery and admitted the prior qualifying strike. The court accepted defendant's plea and waivers on the record. The parties stipulated to a factual basis for the plea as set forth in the police report of the incident. During the plea colloquy, defendant was advised she would be required to pay the statutory minimum fines and she acknowledged her understanding that the fines were part of the negotiated agreement.

The court appointed Dr. Jack Rothberg to evaluate defendant. Defendant was found suitable to participate in the Substance Treatment and Re-Entry Transition program for women. On January 24, 2018, the court ordered defendant conditionally released to participate in the residential treatment program.

Shortly thereafter, defendant absconded from treatment. On February 21, 2018, the court issued a bench warrant. After defendant was returned to custody, the court ordered various continuances to allow counsel the opportunity to find another suitable residential program for defendant. No alternative program was found.

In August 2018, the court imposed a six-year state prison term (a midterm of three years, doubled due to the strike prior). The court awarded defendant total presentence custody credits of 222 days, inclusive of 23 days of residential treatment credits (*People v. Davenport* (2007) 148 Cal.App.4th 240). Over the prosecution's objection, the court dismissed the felony enhancement in the interests of justice. The court imposed a

restitution fine in the amount of $1,200 (Pen. Code, § 1202.4, subd. (b)), a $40 court operations assessment (Pen. Code, § 1465.8), and a $30 criminal conviction assessment (Gov. Code, § 70373). The court imposed and stayed a parole revocation fine in the amount of $1,200 (Pen. Code, § 1202.45).

Defendant requested a certificate of probable cause based on the grounds she received ineffective assistance of trial counsel, causing her not to fully understand the terms of her plea agreement. The court denied defendant's request. This appeal followed.

DISCUSSION

1. Mental Health Diversion (Pen. Code, § 1001.36)

Defendant contends she is entitled to a conditional reversal and remand for an eligibility hearing pursuant to Penal Code section 1001.36. Defendant argues not only that the new provision should be applied retroactively to all cases not yet final on appeal, but that she was not required to obtain a certificate of probable cause to raise the issue on appeal. We reject both contentions.

Defendant relies on *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted December 27, 2018, S252220, for the proposition that Penal Code section 1001.36 should be applied retroactively. Several courts have followed *Frahs*: *People v. Weaver* (2019) 36 Cal.App.5th 1103 (review granted Oct. 9, 2019, S257049); *People v. Burns* (2019) 38 Cal.App.5th 776 (review granted Oct. 30, 2019, S257738); *People v. Hughes* (2019) 39 Cal.App.5th 886 (review granted Nov. 26, 2019, S258541).

Penal Code section 1001.36, which became effective June 27, 2018, authorizes trial courts to grant certain eligible defendants *pretrial* diversion into mental health treatment

programs in lieu of criminal prosecution. (*People v. Craine* (2019) 35 Cal.App.5th 744, 749 (*Craine*), review granted Sept. 11, 2019, S256671; see also Pen. Code, § 1001.36 ["the court may . . . grant pretrial diversion to a defendant pursuant to this section if the defendant meets all of the requirements specified in paragraph (1) of subdivision (b)"].) The statute defines pretrial diversion to mean "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).)

Craine, filed after the grant of review in *Frahs*, rejected the reasoning of *Frahs*, holding that Penal Code section 1001.36 does not apply retroactively where, as here, the charges against the defendant have been adjudicated. Two other courts have followed *Craine*: *People v. Torres* (2019) 39 Cal.App.5th 849 (review den. Dec. 11, 2019, S258491), and *People v. Khan* (2019) 41 Cal.App.5th 460.

We believe *Craine*, *Torres* and *Khan* articulate the better reasoned view given the plain statutory language creating a mechanism for *pretrial* diversion. We adopt the careful and correct analyses of *Craine*, *Torres* and *Khan* in concluding that Penal Code section 1001.36 does not apply retroactively to defendant.

Defendant's argument that she was not required to obtain a certificate of probable cause is dependent on her contention that Penal Code section 1001.36 should be applied retroactively. Defendant contends she is not challenging the substance of the plea but only seeking a benefit to which she is entitled under the new law that went into effect after the entry of her plea.

As we have already explained, we reject defendant's retroactivity argument. As such, defendant's probable cause argument is equally without merit. As our Supreme Court has explained, "[f]or purposes of the certificate of probable cause requirement, the critical question is whether [the defendant's challenge] to his sentence is in substance a challenge to the validity of his plea." (*People v. Cuevas* (2008) 44 Cal.4th 374, 381; see also Pen. Code, § 1237.5.)

Defendant's argument is without question an attack on the validity of her 2017 plea agreement. She seeks to undo the agreement and be allowed to participate in a mental health program, as contemplated by Penal Code section 1001.36, in lieu of criminal prosecution. Defendant has not shown that any valid exception to the certificate of probable cause requirement is applicable here.

2. Imposition of Statutory Fines and Fees

Defendant also contends she is entitled to a remand for a hearing on her ability to pay the statutory fines and assessments.

Defendant forfeited her objection by failing to object on this basis in the trial court and also by consenting during the plea colloquy to imposition of the fines. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 [finding forfeiture where no objection raised in trial court to imposition of court operation assessment, criminal conviction assessment and restitution fine]; see also *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to raise ability-to-pay objection to imposition of restitution fine under Pen. Code, former § 1202.4].)

We further reject defendant's alternative argument her trial counsel was ineffective for failing to raise a constitutional

objection to the imposition of the fines. The fines and assessments were imposed pursuant to clear statutory authority. Defendant has not demonstrated any basis for finding her counsel was ineffective for failing to raise constitutional objections to the fines similar to those set forth in *People v. Dueñas* (2019) 30 Cal.App.5th 1157. *Dueñas* not only involved unique factual circumstances not applicable here, but the validity of its analytical framework has been questioned by numerous courts: see, e.g., *People v. Allen* (2019) 41 Cal.App.5th 312, 326-329 (review den. Jan. 2, 2020); *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-282; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326-329 (review granted Sept. 14, 2019, S258946); *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-929 (review den. Jan. 2, 2020).

3. Correction of Sentencing Errors

Finally, defendant argues the court erred by imposing a restitution fine in an amount four times the agreed-upon minimum, and by failing to award the correct number of presentence custody credits. Respondent concedes these errors and that the appropriate remedy is for this court to reduce the fines to the statutory minimum and order correction of the custody credits.

We agree. The record supports that during the plea colloquy, it was contemplated by the parties that the minimum statutory fines would be imposed. When the fines were ultimately imposed eight months later by a different judge, that fact was apparently not noted in the record and the court imposed a restitution fine four times the statutory minimum. Therefore, the restitution fine, and corresponding parole revocation fine, should be reduced to the agreed-upon $300.

There also appears to have been a calculation error in the number of presentence custody credits. Defendant was entitled to 176 days of custody credits, 23 days of custody credits for time spent in a residential treatment program, and 26 days of conduct credits. On remand, the court shall prepare a modified abstract of judgment correctly noting total presentence credits of 225 days.

DISPOSITION

The judgment of conviction is affirmed. On remand, the superior court is directed to reduce the restitution fine and parole revocation fine to $300 each, and to award total presentence custody credits of 225 days. The superior court shall prepare and transmit a new abstract of judgment to the Department of Corrections and Rehabilitation.

GRIMES, Acting P. J.

I CONCUR:

WILEY, J.

STRATTON, J., Concurring and Dissenting.

I would remand to allow the trial court to exercise its discretion to determine whether appellant is eligible for mental health diversion under Penal Code section 1001.36. I continue to believe Penal Code section 1001.36 is retroactive under the authority of *People v. Frahs* (2018) 27 Cal.App.5th 784, 789–790, review granted, December 27, 2018, S252220. Applying *People v. Hurlic* (2018) 25 Cal.App.5th 50, I would also find appellant is not required to obtain a certificate of probable cause to press her appeal that the newly-enacted mental health diversion statute applies to her non-final judgment.

In all other respects, I concur with the majority opinion.

STRATTON, J.